

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

JEREMY R. POWELL,

Plaintiff,

V.

CITY OF ELKO, *et al.*,

Defendants.

Case No. 3:21-CV-00418-ART-CSD

**ORDER REGARDING REPORT AND
RECOMMENDATION (ECF NO. 68)
AND ORDER (ECF NO. 71)**

I. SUMMARY

Pro se Plaintiff Jeremy Powell (“Powell”), an inmate in the custody of the Lovelock Correctional Center, brings this action under 42 U.S.C. § 1983 against Defendants Bartolo Ortiz, Brenton Pepper, John Adkins, Sergeant Hood, Rosina Garcia, Joanna Contreras, and the City and County of Elko. (ECF No. 69). Before the Court is a Report and Recommendation (“R&R”) of United States Magistrate Judge Craig S. Denney, (ECF No. 68), recommending the Court allow Powell’s claims against defendants other than the City and County of Elko to proceed, while dismissing Powell’s municipal liability claims against the City and County of Elko with prejudice. Powell had until October 11, 2022 to file an objection. To date, no objection to this R&R has been filed. For this reason, and as explained below, the Court adopts the R&R, and will dismiss Powell’s municipal liability claims while allowing his claims against individual defendants to proceed.

Also before the Court is Magistrate Judge Denney's Order, (ECF No. 71), denying Powell's Motion for Appointment of Counsel, (ECF No. 59), and Powell's Objection to this Order (ECF No. 76). While the Court is concerned about Powell's alleged issues accessing important evidence in his case, it agrees with Judge

1 Denney's analysis in ECF No. 71 and does not believe appointment of counsel is
 2 appropriate at this time.

3 **II. LEGAL STANDARD**

4 Here, Powell did not object to Magistrate Judge Denney's Report and
 5 Recommendation. (ECF No. 68). Therefore, the standard for reviewing Magistrate
 6 Judge Denney's R&R is clear error. The Court "may accept, reject, or modify, in
 7 whole or in part, the findings or recommendations made by the magistrate judge."
 8 28 U.S.C. § 636(b)(1). Where a party fails to object to a magistrate judge's
 9 recommendation, the Court is not required to conduct "any review at all . . . of
 10 any issue that is not the subject of an objection." *Thomas v. Arn*, 474 U.S. 140,
 11 149 (1985); *see also United States v. Reyna-Tapia*, 328 F.3d 1114, 1116 (9th Cir.
 12 2003) ("De novo review of the magistrate judges' findings and recommendations
 13 is required if, but *only* if, one or both parties file objections to the findings and
 14 recommendations.") (emphasis in original); Fed. R. Civ. P. 72, Advisory
 15 Committee Notes (1983) (providing that the Court "need only satisfy itself that
 16 there is no clear error on the face of the record in order to accept the
 17 recommendation.").

18 Powell did, however, object to Magistrate Judge Denney's Order denying
 19 Powell's Motion for Appointment of Counsel. (ECF No. 71). As a motion for
 20 appointment of counsel does not appear in the enumerated list of dispositive
 21 motions in 28 U.S.C. § 636(b)(1)(A) it is non-dispositive. *See also* LR IB 1-4. "When
 22 a magistrate judge rules on a non-dispositive matter, a district judge may
 23 'reconsider' that ruling only if it is 'clearly erroneous or contrary to law.' 28 U.S.C.
 24 § 636(b)(1)(A); *accord* Fed. R. Civ. P. 72(a)." *CPC Pat. Techs. Pty Ltd. v. Apple, Inc.*,
 25 34 F.4th 801, 804 (9th Cir. 2022).

26 This Court therefore applies the "clearly erroneous" standard to both the
 27 Report and Recommendation and Order at issue here.

28

1 **III. DISCUSSION**

2 **A. Report and Recommendation (ECF No. 68)**

3 Because there is no objection, the Court need not conduct de novo review,
 4 and is satisfied Magistrate Judge Denney did not clearly err. Here, Magistrate
 5 Judge Denney recommends granting Powell's Motion for Leave to Amend as to
 6 the individual defendants, but denying it as to the municipal defendants. (ECF
 7 No. 68 at 4). Regarding Powell's claims against the municipal defendants,
 8 Magistrate Judge Denney reasoned that Powell did not allege facts that the acting
 9 Defendants had actual authority to set city or county policy as a matter of state
 10 law. (*Id.* at 5:13-16).

11 Powell argues he should be able to hold Elko liable under the third prong
 12 of *Monell* where the individual “who committed the constitutional tort was an
 13 official with final policy-making authority” or such an official ‘ratified a
 14 subordinate's unconstitutional decision or action and the basis for it.” *Gordon v.*
 15 *Cnty. of Orange*, 6 F.4th 961, 974 (quoting *Clouthier v. Cnty. of Contra Costa*, 591
 16 F.3d 1232, 1250 (9th Cir. 2010), *overruled on other grounds by Castro v. Cnty. of*
 17 *Los Angeles*, 833 F.3d 1060 (9th Cir. 2016)). Here, those individuals are Sergeant
 18 Bobby Adkins, the acting shift commander at the jail on the night Powell was
 19 injured, and Rosina Garcia, the head nurse on the night in question.

20 “[W]hether an official had final policymaking authority is a question of state
 21 law.” *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986). Discretion is not
 22 enough, the official “must also be responsible for establishing final government
 23 policy respecting such activity before the municipality can be held liable.” *Id.* at
 24 482-83. Nevada state law provides that “[t]he sheriff is the custodian of the jail in
 25 his or her county, and of the prisoners therein, and shall keep the jail personally,
 26 or by his or her deputy, or by a jailer or jailers appointed by the sheriff for that
 27 purpose, for whose acts the sheriff is responsible.” NRS 211.030.1. Pursuant to
 28 Nevada law, therefore, the sheriff—not Sergeant Adkins or Defendant Garcia—is

1 the final policymaker for purposes of *Monell* liability under the facts at issue in
2 this case. The Court therefore agrees with Magistrate Judge Denney. Having
3 reviewed the R&R and the record in this case, the Court will adopt the R&R in
4 full.

5 **B. Order (ECF No. 71)**

6 Next, the Court turns to Powell's Objection, (ECF No. 76), to Magistrate Judge
7 Denney's Order Denying Powell's Motion for Appointment of Counsel. (ECF No.
8 71). As with Judge Denney's Report and Recommendation, here the Court is
9 satisfied that he did not clearly err. As Judge Denney noted, appointment of
10 counsel in a civil case is allowed in "exceptional cases." *Palmer v. Valdez*, 560
11 F.3d 965, 970 (9th Cir. 2009) (citations omitted). When determining if exceptional
12 circumstances exist, a court considers both the likelihood of success on the
13 merits and the ability of the *pro se* litigant to articulate their claims "in light of
14 the complexity of the legal issues involved." *Id.* (quoting *Weygandt v. Look*, 718
15 F.2d 952, 954 (9th Cir. 1983)).

16 Powell attributes the complexity of his case to alleged restrictions placed on
17 his ability to access discovery in his case. (ECF No. 76 at 4). Powell claims he was
18 forced to mail out of the prison the thumb drive containing the evidence he
19 needed to view, was directed from his caseworker to the warden and back again
20 seeking approval to view the footage, and told he needed approval from Nevada's
21 Attorney General to review the footage even though NDOC is not a party to this
22 action. (*Id.* at 5-6).

23 The legal complexities of this case are similar to most 42 U.S.C. § 1983 actions
24 before this Court, although the discovery issues Powell reports are more unusual.
25 In response to similar discovery-related allegations raised in Powell's Fourth
26 Motion for Appointment of Counsel, (ECF No. 59), Magistrate Judge Denney
27 ordered the warden to "assure that Plaintiff is given a reasonable opportunity to
28 review the relevant footage and take notes, although he may not possess the video

1 footage in his cell." (ECF No. 71). The Court agrees with Magistrate Judge Denney
2 that the difficulties Powell alleges in accessing pertinent evidence in his case may
3 be remedied by court order. At this time, these discovery-related difficulties do
4 not raise the complexity of this case sufficiently to warrant appointment of
5 counsel. With that said, if these difficulties are not resolved promptly, the Court
6 will look favorably on future motions for appointment of counsel.

7 For the aforementioned reasons, this Court agrees with Magistrate Judge
8 Denney, and overrules Powell's Objection, (ECF No. 76), to Judge Denney's Order
9 (ECF No. 71).

10 **C. Powell's Allegations Regarding Access to Discovery**

11 While the Court is satisfied that Magistrate Judge Denney did not clearly err,
12 it writes separately to comment on Powell's allegations regarding access to
13 discovery. Powell describes a Kafkaesque series of events that has allegedly
14 deprived him of his right to review pertinent discovery in his case. It is not clear
15 if NDOC, a non-party, has complied with Judge Denney's order in ECF No. 71.

16 To reiterate, therefore, defense counsel shall ensure that the relevant video
17 evidence is sent to the warden of the facility where Powell is incarcerated in a
18 format that complies with the relevant policies and procedures of NDOC. Powell
19 may present a copy of this Order to the warden, who must assure that Powell is
20 given reasonable opportunities to review all available discovery in this case—
21 including medical records—and take notes, although Powell may not possess the
22 discovery materials in his cell. Powell must be afforded reasonable opportunities
23 to review discovery no later than February 28, 2023.

24 Defense counsel must file a sworn affidavit from someone with personal
25 knowledge of the opportunities Powell has been afforded to review discovery that
26 includes the dates, times, and durations of the opportunities provided, along with
27 the items of discovery available for Powell to review no later than February 28,
28 2023.

1 **IV. CONCLUSION**

2 It is therefore ordered that Magistrate Judge Denney's Report and
3 Recommendation, (ECF No. 68), is accepted and adopted in full.

4 It is further ordered that Powell's motion for leave to amend, (ECF No. 47),
5 is **GRANTED-IN-PART AND DENIED-IN-PART** as follows: Plaintiff should be
6 allowed to **PROCEED** with Claims 1-10 in the FAC against defendants Ortiz,
7 Pepper, Hood, Rosina Garcia, Bobby Adkins, and Joanna Contreras; however,
8 Claims 11-15 for municipal liability against the City and County of Elko should
9 be **DISMISSED**, and because Plaintiff has already had an opportunity to correct
10 these deficiencies, the dismissal should be with prejudice.

11 It is further ordered that Powell's Objection, (ECF No. 76), to Magistrate
12 Judge Denney's Order, (ECF No. 71), is **OVERRULED** and, as such, Powell's
13 Motion for Appointment of Counsel (ECF No. 59) remains **DENIED**.

14 It is further ordered that defense counsel shall ensure that the relevant
15 video evidence is sent to the warden of the facility where Powell is incarcerated in
16 a format that complies with the relevant policies and procedures of NDOC. Powell
17 may present a copy of this Order to the warden, who must assure that Powell is
18 given reasonable opportunities to review all available discovery in this case—
19 including medical records—and take notes, although Powell may not possess the
20 discovery materials in his cell. Powell must be afforded reasonable opportunities
21 to review discovery no later than February 28, 2023.

22 //

23 //

24 //

25 //

26 //

27 //

28 //

1 It is further ordered that defense counsel must file a sworn affidavit from
2 someone with knowledge of the opportunities Powell has been afforded to review
3 discovery that includes the dates, times, and durations of the opportunities
4 provided, along with the items of discovery available for Powell to review no later
5 than February 28, 2023.

6

7 DATED THIS 10th day of January 2023.

8

9

10



11 ANNE R. TRAUM
12 UNITED STATES DISTRICT JUDGE

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28